

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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To be argued by
GUSTAVE WEISS

Docket No. 74-1451

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,
-against-
JOHN BOSTON and ERNEST MOORE,
Appellants.

UNITED STATES OF AMERICA,
Appellee,
-against-
JOHN BOSTON and ERNEST MOORE,
Appellants.

1. Whether the pre-trial photographic identification of Appellant Moore was prejudicial and should have been suppressed.
2. Whether the charge to the jury was in error in failing to charge a lesser included offense of bank larceny and was otherwise prejudicial to the appellants.

PRELIMINARY

Ernest Moore appe

Ernest Moore appeals from a judgment, entered April 5, 1974, after a trial before District Court Judge Mark A. Costantino and a jury, convicting him of all charges in a two count indictment. Count One charged appellant and his co-defendant-appellant with the robbery of a branch of the National Bank of North America [U.S.C. §2113(a); Count Two charged the appellant and his co-defendant-appellant, in committing the offense of bank robbery, assaulted and put

in jeopardy the lives of bank employees by the use of dangerous weapons. [18 U.S.C. §2113(d)]

On April 5, 1974, appellant was sentenced by Judge Costantino to a term of twenty years on each count, the terms to run concurrently.

A notice of appeal was duly filed and subsequently, counsel, who had been appointed pursuant to the Criminal Justice Act in the District Court, was continued as assigned counsel on appeal.

STATEMENT OF FACTS

On June 2, 1971, three armed perpetrators robbed the Baisley Park branch of the National Bank of North America and fled the scene before arrival of law enforcement personnel.

The next day, June 3, co-defendant-appellant John Boston was arrested with another and they were charged with participating in the bank robbery. Thereafter, on June 17, 1971, appellants Boston and Moore, along with others, were indicted for the crime. (The others were severed prior to trial.)

Appellant Ernest Moore was arrested July 14, 1972 by agents of the F.B.I. pursuant to an arrest warrant.

SUPPRESSION MOTION

Appellant Ernest Moore moved, inter alia, to suppress a photographic identification made by two bank employees, one made on January 2, 1973 and the other on January 9, 1973, approximately nineteen months after the robbery.

THE SUPPRESSION HEARING

Joseph Dente, the branch manager, testified that on the morning of June 2, 1971, while seated at his desk in the bank, he suddenly realized the bank was being robbed by three robbers.[33]* He testified the entire robbery lasted about ten minutes [33] and that he first saw the appellants in the vault area.[35]

Dente first became aware of the robbery when he heard the order "Freeze" and saw a third robber facing him with a sawed off shotgun.[61] Immediately after the robbery, Dente described all three perpetrators to the F.B.I. as being Negro males, five-foot-nine and weighing 180 pounds[132] and John Jackson, the security guard, was unable to describe Appellant Moore.[203, 204].

On direct examination, Dente was shown a spread of pictures (Government's Exhibit 9-17) which he said had been shown to him by F.B.I. Agent Jones in January, 1973.[43]

*Numbers in parentheses refer to the page of the trial transcript

He further testified he had made a selection of one photo at that time.[43] When asked by the prosecutor to identify which photo he had previously identified to Agent Jones, Dente selected a photo of someone other than Appellant Moore [43] and was then assisted by the prosecutor in selecting appellant's photo.[44] Two days prior to the hearing, Dente had failed to select Moore's photo out of the same spread.[44,45]

Three of the photos used in the spread containing Moore's photo (Government's Exhibit 9-17) were contained in the spread previously used in Government' Exhibit 1-8 (Co-Appellant Boston's spread) [150] and a fourth in the spread of the third defendant[150] and viewed by Dente and discarded by him prior to his purported identification of Appellant Moore in January, 1973.

Dente testified that on January 9, 1973, Agent Jones brought several photos to him at his place of employment [133]; that Jones showed him a group of pictures and asked him to select Appellant Moore's photo[135]; announced to him (Dente) that a picture of the perpetrator of the bank robbery was in the group.[138,139, 141]

At the conclusion of the suppression hearing, Judge Costantino denied Appellant Moore's motion to suppress the photo identification.[952] The Government then moved to dismiss Count V of the indictment (the conspiracy count) and the trial proceeded on Counts I and II, charging violation of

.. Title 18 U.S.C. §2113(a) and §2113(d).

At the conclusion of the trial, the jury returned a verdict of guilty on both counts.[1437]

On April 5, 1974, Appellant Moore was sentenced by Judge Costantino to a term of twenty years on Count I and to a term of twenty years on Count II, both terms to run concurrently.

MILLERS FALLS
ERASE
COTTON CONTENT

ARGUMENT

POINT I

APPELLANT'S MOTION TO SUPPRESS
THE PHOTOGRAPHIC IDENTIFICATION
SHOULD HAVE BEEN GRANTED SINCE
IT WAS UNFAIRLY CONDUCTED

The major evidence adduced by the Government against Appellant Moore consisted of the testimony of two eye witnesses, Joseph Dente and John Jackson. A third witness, an ex-convict, testified he had stolen a car and loaned it to appellant. Jackson described the getaway car as being the same make and color as the car allegedly stolen by the ex-convict.

With respect to Appellant Moore, no other testimony was adduced - no fingerprints, no bait money, no proceeds of the robbery, no surveillance photos or other physical evidence and no statements or confessions of any kind implicated Moore. Thus the testimony of the two eye witnesses that they had previously identified Moore from photographs became crucial.

The manner in which the pretrial photographic identification of Appellant Moore was conducted was manifestly unfair, particularly with reference to the identification made by witness Joseph Dente.

It is axiomatic that any pretrial identification procedure is unlawful if conducted in so suggestive a manner as to deny a defendant due process of law. Stoval v. Denno 388 US 293 (1967); Palmer v. Peyton 359 F2d 199 (4th Cir. 1966). There is a denial of due process "if the photographic identification procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States 390 US 377, 384 (1968)

This is so even if the procedure is not patently unfair. In every photographic identification procedure there is an inherent danger that a witness may make an incorrect identification. This danger was highlighted by the court in Simmons v. United States (supra), at page 383,

"This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the picture of several persons among which the photograph of a single individual recurs, or is in some way emphasized. (italics added)

Thus the communication between F.B.I. Agent Jones and witness Joseph Dente before, during and after the witness had been shown the photographs indicated that the F.B.I.

believed they had the third bank robber and that his picture was included in the spread. Appellant Moore's photograph was

obviously emphasized to Dente as shown by Dente's testimony that Agent Jones indicated to him that Moore's photograph was in the spread and that a picture of the perpetrator was in the spread. Moore's photograph was further emphasized by including ^{three} ~~the~~ photographs in his spread which had been previously included in prior examinations by Dente when identifying co-defendant Boston and necessarily discarded by Dente at that time. Another photograph used in his spread was also used in a related spread - that of the third defendant - and also examined and discarded by Dente at a prior date. The same facts concerning the make-up of the spreads occurred when eye witness Jackson made his selection of the appellant's photograph. Thus the photographic spread of nine photographs used in Moore's spread was effectively reduced to five photographs.

Honorable Nathan Sobel, an experienced prosecutor and judge involved in thousands of criminal cases in New York State, in his treatise entitled "EYE WITNESS IDENTIFICATION: Legal and Practical Problems" (1972) enunciates a set of six suggested standards of "fairness" (the consensus of experts in the field) and the one dealing with standards for photographic identification, at page 110, states, in part:

- "1. A series of at least ten photos, only one of which shall be of the suspect, shall be presented to the witness * * * *."

COTTON CONTENT

The use of less than ten photographs in identifying Appellant Moore failed to meet an accepted standard of fairness.

That the identification of Moore's photograph in the presence of F.B.I. Agent Jones on January 9, 1973 (some nineteen months after the robbery) was the product of impermissible suggestion is evident when eye witness Dente selected the wrong photograph at the suppression hearing and had to be assisted by the prosecutor.

POINT II

THE PHOTOGRAPHIC IDENTIFICATION
OF APPELLANT SHOULD HAVE BEEN
SUPPRESSED SINCE NO CORPOREAL
LINEUP WAS HELD

The subject crime occurred June 2, 1971. Appellant Moore was indicted June 17, 1971 and arrested June 14, 1972. He has been in continuous federal custody since. He had been in continuous federal custody approximately nineteen months at the time the eye witnesses made their pretrial photographic identification. At no time was a corporeal lineup conducted.

Appellant Moore does not quarrel with the use of a photographic identification procedure during the investigatory stage. However, for trial purposes, once a defendant is in custody, this court should require the law enforcement personnel

to conduct a corporeal lineup in preference to a photographic spread - particularly a photographic spread that contains only mug shots and has no reference to height, weight or other physical characteristics.

The requirement of conducting a corporeal lineup in preference to a photographic identification has been urged by Honorable Nathan Sobel in his treatise on eye witness identification (supra), page 79,

"Once a suspect is in police custody, there is simply never any justification for employing photo identification procedures, since a corporeal lineup is available. * * * * One practical reason is that a witness is less reluctant to take a chance with a "look-alike" when impersonally viewing a rogues' gallery than when viewing a corporeal lineup."

An identification procedure requiring a corporeal lineup, when available, will better insure a fair identification. The defendant in such case would then have the assistance of counsel to guard against any unfair tactics on the part of the police in the course of conducting the identification. A photographic identification procedure conducted without presence of defendant's counsel makes it exceedingly difficult, if not impossible, for counsel to uncover unfair tactics on the part of the police - even with extensive cross-examination - at a subsequent hearing or trial.